Paari a/l Perumal v Dr Haji Mohamed Feizal bin Abdullah

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-23-01 OF 1998
KAMALANATHAN RATNAM J
20 JUNE 2000

Civil Procedure *— Pleadings — Further and better particulars — Failure to furnish in prescribed form pursuant to O 18 r 12(7) of Rules of the High Court 1980 — Extension of time — Exercise of judicial discretion — Whether application should be allowed*

The plaintiff sued the defendant for uttering defamatory words against him. On 13 April 1998, the plaintiff who sought further and better particulars, obtained an order directing the defendant to furnish the required particulars failing which paras 7 and 8 of the defence were to be struck out. Upon receipt of the purported further and better particulars by way of the letter dated 20 April 1998, the plaintiff's solicitors pointed out to the defendant's solicitors that the required particulars ought to be in the mandatory prescribed form pursuant to O 18 r 12(7) of the Rules of the High Court 1980 ('the RHC'). The defendant filed another application (encl 37) for extension of time to comply with the order of the court dated 13 April 1998 and that the defendant be allowed to file and serve the plaintiff the required particulars within seven days from the date the order is made.

Held:

As soon as the present solicitors discovered the error, they had applied to the court for an extension of time. One of the factors that the court ought to consider is the likelihood of prejudice if the court allowed the application. If the application is allowed, the plaintiff will have the particulars in the prescribed form. However, the prejudice that would occasion the defendant is that his paras 7 and 8 of the defence would be struck out. The justice of the case demands that the application be allowed. A court has jurisdiction to extend the time where an 'unless' order had been made and not complied with provided the judge exercised his discretion judiciously (see p 594D–F); see *Samuels v Linzi Dresses Ltd* [1980] 1 All ER 803.

[Bahasa Malaysia summary

Plaintif telah mendakwa defendan kerana mengatakan perkataan-perkataan fitnah terhadapnya. Pada 13 April 1998, plaintif yang telah memohon butir lanjut dan jelas, telah memperolehi perintah mengarahkan defendan untuk memberikan butir-butir yang diperlukan dan kegagalan menyebabkan perenggan 7 dan 8 pembelaan diketepikan. Atas penerimaan butir-butir lanjut dan jelas melalui surat mereka yang bertarikh 20 April 1998, peguam plaintif

menunjukkan kepada peguam defendan bahawa butir-butir yang diperlukan sepatutnya di dalam bentuk mandatori menurut A 18 k 12(7) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Defendan telah memfailkan suatu permohonan yang lain (lamp 37) untuk perlanjutan masa untuk mematuhi arahan mahkamah bertarikh 13 April 1998 dan bahawa defendan dibenarkan untuk memfail dan menyampaikan kepada plaintif butir-butir yang diperlukan di dalam masa tujuh hari dari tarikh perintah dibuat

Diputuskan:

Sebaik sahaja peguam-peguam yang mengendalikan kes mendapati kesilapan tersebut, mereka telah memohon kepada mahkamah untuk perlanjutan masa. Salah satu faktor-faktor yang mahkamah patut mempertimbangkan adalah kecenderungan prejudis jika mahkamah membenarkan permohonan tersebut. Jika permohonan dibenarkan, plaintif akan memperolehi butir-butir di dalam bentuk yang ditentukan. Namun, prejudis yang akan berlaku kepada defendan adalah bahawa perenggan 7 dan 8 pembelaan akan dibatalkan. Keadilan kes menuntut bahawa permohonan tersebut dibenarkan. Mahkamah mempunyai bidang kuasa untuk melanjutkan masa di mana suatu perintah menetapkan had masa telah dibuat dan tidak dipatuhi dengan syarat hakim menjalankan budi bicaranya secara kehakiman (lihat ms 594D–F); lihat *Samuels v Linzi Dresses Ltd* [1980] 1 All ER 803.]

Notes

For cases on further and better particulars, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3547–3548.

Cases referred to

Capital Insurance Bhd v Kasim bin Mohd Ali [2000] 1 MLJ 193 (refd)

Lee Tee @ Lee Kim Mok & Anor v Seek Lai Neo & Anor [2000] 1 MLJ 466 (refd)

Samuels v Linzi Dresses Ltd [1980] 1 All ER 803 (refd)

Sinnathamby & Anor v Lee Chooi Ying [1987] 1 MLJ 110 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 12(7), Form 35

K Kulasekar (*A Murali* with him) (*K Kulasekar & Associate*) for the plaintiff.

RS Sothi (*Saraswathy Devi* with him) (*N Saraswathy Devi*) for the defendant.

Kamalanathan Ratnam J:

Facts

The plaintiff is a senior litigation clerk in a legal firm ('the firm'). The defendant's wife ('the client') retained the firm to act on her behalf in respect of a tenancy matter. The client had previously engaged the services of another legal firm which said the firm had billed the client for their services rendered. Since the client had not settled the bill the earlier firm wrote to the present firm enquiring if the latter would accept service of summons on behalf of the client in respect of their services rendered. The plaintiff then contacted the client by phone and informed her of the pending action in respect of the solicitors' fees.

The plaintiff now contends that the defendant uttered defamatory words against him to his employer, a partner of the legal firm. The plaintiff then sued the defendant for damages, injunction, interest and costs.

Having perused the defence, the plaintiff sought further and better particulars and obtained an order on 13 April 1998 directing the defendant to furnish the required particulars failing which paras 7 and 8 of the defence were to be struck out. On 27 September 1999 the defendant filed a notice of change of solicitors. Soon thereafter the defendant's present solicitors filed an application for leave to amend the defence. This application has not been heard as yet. In the meantime, the defendant filed another application encl 37 for extension of time to comply with the order of the court dated 13 April 1998 and that the defendant be allowed to file and serve the plaintiff the required particulars within seven days from the date the order is made. This application is vehemently opposed by the plaintiff.

Findings of the court

In support of encl 37 the defendant exhibited a letter dated 20 April 1998 from his former solicitors and addressed to the plaintiff's solicitors, purportedly complying with the order of court dated 13 April 1998 and furnishing the particulars. The defendant then exhibited another letter dated 19 May 1998 also from his former solicitors and addressed to the plaintiff's solicitors confirming that he had complied with the order of the court dated 13 April 1998. Copies of both these letters were in fact sent to the defendant by his former solicitors. Based on these two letters the defendant believed that his solicitors had indeed complied with the order of court.

Upon receipt of the purported further and better particulars by way of the letter dated 20 April 1998 the plaintiff's solicitors immediately on the following day, by their letter dated 21 April 1998, pointed out to the defendant's solicitors that the required particulars ought to be 'in the mandatory prescribed form pursuant to O 18 r 12(7) of the Rules of the High Court 1980 ('the RHC') and that the same ought to be served on them as solicitors 'on or before the 22 April 1998'. Since the defendant's

A solicitors failed to respond, the plaintiff's solicitors then wrote to the defendant's solicitors a letter dated 23 April 1998 which reads as follows:

> As you have failed to serve the further and better particulars as ordered in the prescribed form on or before 4.00 pm on the 22 of April 1998, paras 7 and 8 of your client's statement of defence is struck out.

B The defendant in the meantime pleads that his solicitor's lack of knowledge of the law ought not to weigh against him and that in the interest of justice, he be allowed the extension of time. He has in any case by way of an undated letter lodged a formal complaint with the Disciplinary Board of the Bar Council against his former solicitor's conduct.

C It is clear that in spite of being referred to O 18 r 12(7) of the RHC which requires the particulars to be served in accordance with Form 35, the defendant's former solicitor turned a blind eye. It is very surprising for a lawyer when he is referred to a particular relevant law, to even refuse to look at it. The reason for the need to have the particulars filed as a formal document, in the same way as a pleading, is because that document together D with the request for particulars and the order granting the request for particulars should all be incorporated in the Bundle of Pleadings.

The plaintiff's solicitors referred me to *Lee Tee @ Lee Kim Mok & Anor v Seek Lai Neo & Anor* [2000] 1 MLJ 466 where the Court of Appeal had held that the knowledge of a solicitor is regarded by law as the knowledge E of the client, except where the solicitor acted fraudulently. I do not see how this case helps the plaintiff. Firstly, in that case the 'knowledge' referred to was the knowledge of the existence of a first agreement which the appellants' solicitor knew of and which knowledge the court held the appellants themselves were deemed to have knowledge of. Therefore, since they ought to have had knowledge of the existence of the first agreement, F the court went on to hold that the appellants ought to have made the necessary search and that therefore they could not be held to be bona fide purchasers for value without notice. Secondly, it is necessary to point out that the meaning of the word 'knowledge' that ought to apply to the case before me is knowledge of the law on the part of the defendant's former G solicitor. He ought to have known that O 18 r 12(7) of the RHC requires that the particulars sought and ordered to be provided, must be provided pursuant to the set form that has been provided and that it ought not to have been provided by way of a letter as was done by the solicitor. The plaintiff's solicitors in opposing this application then relied upon the Court of Appeal's decision in *Capital Insurance Bhd v Kasim bin Mohd Ali* [2000] H 1 MLJ 193. In that case at the hearing of an appeal counsel for the respondents raised a preliminary objection on the ground that the record of appeal was bad in law and ought to be set aside for non-compliance with certain Rules of the Court of Appeal inter alia that the supplementary appeal record, which contained a photostated copy and not a sealed copy or a certified true copy of the sealed copy of the order appealed against, was I itself filed out of time and that leave to file out of time had not been obtained. The plaintiff before me relied upon a passage of Mokhtar Sidin JCA at p 202, which states as follows:

> ... Taking into consideration the attitude of the appellant for ignoring the defects and irregularities, after the respondents had pointed them out, we would not exercise our discretion to help the appellant in regularizing the appeal record. We felt that the preliminary objections raised by counsel for the respondents were well taken.

The appeal was therefore dismissed. Mr A Murali for the plaintiff urged upon me to hold in like manner and pointed out that even though he had pointed out the law to the defendant's previous solicitor, the latter had blindly refused to file the particulars in the proper format. I do not think that the passage quoted was the basis for the Court of Appeal's refusal to proceed with the appeal. The Court of Appeal found that even the supplementary appeal record that was filed was itself defective since a photostated copy of the order was filed. In the circumstances, Mokhtar Sidin JCA said also at p 202:

> ... Our answer to the application for extension of time is that we find the supplementary appeal record itself defective and as such there is nothing for us to extend.

In the case before me as soon as the present solicitors discovered the error they had applied to this court for an extension of time. In *Sinnathamby & Anor v Lee Chooi Ying* [1987] 1 MLJ 110 (SC) the then Supreme Court held that the mistake of a solicitor is no longer a ground for refusing an application for extension of time to appeal. One of the factors that I ought to consider is the likelihood of prejudice if I allowed this application. What frankly is the prejudice the plaintiff is likely to suffer other than the fact that he will now have the particulars in the prescribed form? The prejudice that would occasion the defendant is that his paras 7 and 8 of the defence would be struck out. I am still at case management stage. To my mind, the justice of the case demands that I allow this application, in the exercise of my discretion. After all, in *Samuels v Linzi Dresses Ltd* [1980] 1 All ER 803 the Court of Appeal held that a court had jurisdiction to extend the time where an 'unless' order had been made and not complied with provided the judge or the master exercised his discretion judiciously.

Having considered all issues I allow the defendant's application which includes a prayer that the defendant do pay the plaintiff the costs of this application.

Order accordingly.

Reported by Benjamin Yong